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FILED
MAR 27 1991

No. 90-1337

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA,
Petitioner,

v.

OLIVER L. NORTH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Indictment and Trial	1
The Appeal	5
The Rehearing Petition	8
REASONS FOR DENYING THE WRIT	9
I. THE PROSCRIPTIONS OF *KASTIGAR* APPLY IN THE GRAND JURY	10
A. Use of Immunized Testimony by a Grand Jury Is Impermissible	10
B. *United States* v. *Mechanik* Is Inapplicable	16
II. THE DECISION TO REMAND IS CORRECT, FACT-BOUND, AND INTERLOCUTORY	18
A. The Hearing Ordered on Remand Is Consistent with Case Law and Compelled by the Record	20
B. The IC Asks This Court to Address Questions That Are Not Presented	22
C. The Question Whether Improper Use Was Made of Immunized Testimony Is Fact-Specific and Does Not Warrant Review by This Court	29
D. The Decision to Remand Is Interlocutory	29
CONCLUSION	30

TABLE OF AUTHORITIES

Cases — Page

Aetna Life Insurance Co. v. *Lavoie*, 475 U.S. 813 (1986) 29
Ashwander v. *Tennessee Valley Auth.*, 297 U.S. 288 (1936) 17
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & A.R. Co.*, 389 U.S. 327 (1967) 29
Bruton v. *United States*, 391 U.S. 123 (1968) 28
Costello v. *United States*, 350 U.S. 359 (1956) 6, 11, 13, 14
Davis v. *United States*, 417 U.S. 333 (1974) 15
Goldberg v. *United States*, 472 F.2d 513 (2d Cir. 1973) 15
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 19, 29
Harris v. *New York*, 401 U.S. 222 (1971) 12
In re Sealed Case, 791 F.2d 179 (D.C. Cir.), *cert. denied*, 479 U.S. 924 (1986) 21
Kastigar v. *United States*, 406 U.S. 441 (1972) ..... *passim*
Lawn v. *United States*, 355 U.S. 339 (1958) 11, 14, 15
Midland Asphalt Corp. v. *United States*, 489 U.S. 794 (1989) 11, 12, 18
Murphy v. *Watefront Comm'n*, 378 U.S. 52 (1964) 20, 25
New Jersey v. *Portash*, 440 U.S. 450 (1979) 12, 13
NLRB v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 (1981) 19
Republic National Gas Co. v. *Oklahoma*, 334 U.S. 62 (1948) 19
United States v. *Anzalone*, 555 F.2d 317 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978) 15
United States v. *Beery*, 678 F.2d 856 (10th Cir. 1982) 13, 14, 21
United States v. *Biaggi*, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 59 U.S.L.W. 3598 (U.S. 1991) 25
United States v. *Blue*, 384 U.S. 251 (1966) 10, 11, 15
United States v. *Brimberry*, 803 F.2d 908 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987) 21
United States v. *Calandra*, 414 U.S. 338 (1974) 6, 10, 11, 13, 14, 15

TABLE OF AUTHORITIES—Continued

Page

United States v. *Cortese*, 568 F. Supp. 119 (M.D. Pa. 1983) 13, 14
United States v. *Fountain*, 840 F.2d 509 (7th Cir. 1988) 18
United States v. *Garrett*, 797 F.2d 656 (8th Cir. 1986) 13, 14, 20
United States v. *Hampton*, 775 F.2d 1479 (11th Cir. 1985) 13, 21, 26
United States v. *Hinton*, 543 F.2d 1002 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976) 15
United States v. *Hooker*, 841 F.2d 1225 (4th Cir. 1988) 18
United States v. *Johnston*, 268 U.S. 220 (1925) 19, 29
United States v. *Kurzer*, 534 F.2d 511 (2d Cir. 1976) 15, 21
United States v. *Mechanik*, 475 U.S. 66 (1986) 16, 17, 18
United States v. *Nemes*, 555 F.2d 51 (2d Cir. 1977) 15, 21
United States v. *Palumbo*, 897 F.2d 245 (7th Cir. 1990) 13, 20
United States v. *Pelletier*, 898 F.2d 297 (2d Cir. 1990) 15
United States v. *Poindexter*, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989) 3
United States v. *Poindexter*, No. 90-3125 (D.C. Cir. January 18, 1991) 17
United States v. *Rinaldi*, 808 F.2d 1579 (D.C. Cir. 1987) 20, 21, 27
United States v. *Rivieccio*, 919 F.2d 812 (2d Cir. 1990) 14, 15
United States v. *Romano*, 583 F.2d 1 (1st Cir. 1978) 25
United States v. *Semkiw*, 712 F.2d 891 (3d Cir. 1983) 20, 21
United States v. *Serrano*, 870 F.2d 1 (1st Cir. 1989) 24
United States v. *Society of Indep. Gasoline Marketers of America*, 624 F.2d 461 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981) 14

TABLE OF AUTHORITIES—Continued

Page

United States v. *Tantalo*, 680 F.2d 903 (2d Cir. 1982) 15
United States v. *Tormos-Vega*, 656 F. Supp. 1525 (D.P.R. 1987), *aff'd sub nom. United States* v. *Boscio*, 843 F.2d 1384 (1st Cir.), *cert. denied*, 488 U.S. 848 (1988) 13, 25
United States v. *Wallach*, 870 F.2d 902 (2d Cir. 1989) 18
United States v. *Zielezinski*, 740 F.2d 727 (9th Cir. 1984) 13, 14, 20
Webster v. *Reproductive Health Services*, 109 S. Ct. 3040 (1989) 17

Constitutional and Statutory Provisions

28 U.S.C. § 1291 12
U.S. Const. amend. V 20

Rules

Fed. R. Crim. P. 6(d) 16
Fed. R. Crim. P. 6(e) 12

Other

Harlan, *Manning the Dikes*, 13 Record of NYC Bar Ass'n 541 (1958) 15, 16
Walsh, *Immunity and Prosecution: A First Interim Report* (April 28, 1987) 9

STATEMENT OF THE CASE

For six days in July 1987, Oliver L. North was compelled to testify before Congress pursuant to a statutory grant of immunity. No immunized testimony has received greater public dissemination or caught so much rapt attention. North's testimony was broadcast live on radio and all three television networks to millions of people around the world, replayed on evening TV, and reprinted in daily newspapers and weekly magazines with banner headlines. Thereafter, his testimony was further disseminated and analyzed in the public media, and trial and grand jury witnesses and their aides "immersed themselves" in it, App. 21a.[1]

Indictment and Trial

North was indicted on March 16, 1988.[2] He promptly moved for dismissal or, in the alternative, a hearing pursuant to *Kastigar* v. *United States*, 406 U.S. 441 (1972), at which the independent counsel ("IC") would be required to meet its "heavy burden" under the Fifth Amendment of showing "legitimate independent sources" for its grand jury and trial evidence. *Id.* at 461-62. The court responded that it would conduct the *Kastigar* inquiry in stages, and it scheduled what it called a "preliminary *Kastigar* hearing" (JA 726-27) "directed to certain limited *Kastigar* issues." JA 281.[3] The court stated that its "preliminary" hearing would focus on the "administrative steps" taken by the IC to ensure that staff members were not exposed to immunized testimony, and it promised that any final determination would await "the

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[1] Citations to "App." refer to Petitioner's Appendix.

[2] North was indicted with Admiral John Poindexter, Major General Richard Secord (USAF Ret.), and Albert Hakim. The indictment contained 23 counts; 16 named North as a defendant. On June 8, 1988, the court granted defendants' motions for severance and ordered four separate trials. The IC elected to try North first.

[3] Citations to "JA" refer to the Joint Appendix filed in the court of appeals.

conclusion of the trial *when a final Kastigar hearing will be held.*" JA 283 (emphasis added).

The "preliminary" hearing was extremely limited in scope. The court permitted only one witness, IC Lawrence Walsh, to testify and permitted testimony only about the "administrative procedures" purportedly implemented to avoid exposure to immunized testimony—but not about their actual effectiveness. The court severely limited the scope of cross-examination[4] and permitted the IC to handpick the 24 pages of documents on which he would rely at the hearing.[5] The IC nevertheless admitted that he was unable to identify a single witness who was not exposed to North's immunized testimony. JA 763-64.

After the "preliminary" hearing, defense counsel argued that the IC had not met the "heavy" burden imposed by *Kastigar* of proving that all of the evidence it had used at the grand jury and intended to use at trial was derived from legitimate independent sources. The court replied: *"I didn't think it would because it's a preliminary, not a final hearing.* And the question really is a more narrow one as to the degree to which an adequate showing has been made to permit the case to go forward." JA 778 (emphasis added).

Nonetheless, just three weeks later the court issued an opinion, final in tone, that broadly rejected North's motion. App. 269a. Although the court had held only the narrow "preliminary" hearing on procedures, had not required the IC to present evidence about actual exposure, use or independent sources, and had precluded North from presenting evidence on actual exposure or use, the court issued broad "findings" on those issues, construing gaps in the obviously inadequate record *against* North. *See* App. 297a-98a. The court recognized that "[w]it-

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[4] *E.g.*, JA 744, 771, 772-73.

[5] All defense requests for other documents were either summarily denied or granted only after the IC had finished his testimony. *E.g.*, JA 731-35, 737-39, 741-42, 752-53; *see* JA 765-69 (access denied because this is not the "penultimate *Kastigar* hearing").

nesses, probably a considerable number of them, have had their memories refreshed by the immunized testimony." App. 295a. But it ruled that use to revive a witness's recollection is "nonevidentiary," that "nonevidentiary" use is permissible under *Kastigar*, and that the trial testimony of witnesses who had used immunized testimony to refresh their recollections would be allowed. App. 295a-96a.[6]

Prior to and during trial, North repeatedly sought but was denied an opportunity to *voir dire* witnesses about their exposure to and use of his immunized testimony. For each witness, North filed a motion requesting such a *voir dire*, each of which was denied,[7] until the trial court requested that North file an omnibus motion for all witnesses, which was also denied. JA 494. The motions set out proposed questions relevant to the critical issues of exposure and use. JA 2422-24. The defense also repeatedly sought to introduce evidence that key government witnesses had been exposed to the immunized testimony, but it was not permitted to do so.[8]

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[6] North challenged the trial court ruling in a petition for a writ of mandamus. The court of appeals denied the petition without reaching the merits. With respect to the grand jury taint issue, the court ruled that "any claims of unfair prejudice arising out of alleged grand jury error will be reviewable on direct appeal." *United States* v. *Poindexter*, 859 F.2d 216, 222 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). With respect to trial taint, the court rejected North's argument that the trial court was required to hold a *pretrial* evidentiary hearing, holding that it is within the trial court's discretion to delay a hearing until after trial. *Id.*

[7] Congressman Lee Hamilton was the first witness against North. As Chairman of the House Iran-Contra Committee, he watched in person as North testified under immunity about matters in which Hamilton had been directly involved. Although Hamilton had never testified about those matters or given an interview to the IC before he heard North's immunized testimony, no *voir dire* concerning *Kastigar* issues was permitted.

[8] Proffers filed under seal with the trial court demonstrated that government attorneys from the CIA, the Departments of Justice and State, and the National Security Council had gathered, analyzed, taped, annotated, synopsized, and otherwise studied North's

Although the court had acknowledged that all witnesses had been exposed to "significant aspects" of North's testimony, JA 777, the court did no more than instruct the witnesses at the outset of their testimony not to testify to anything "learned" from hearing North's immunized testimony. JA 1856-1943. The court did not ask, and the defense was not permitted to ask, whether and to what extent the witnesses were exposed to the testimony; whether they recalled what they had learned from the testimony; whether they could possibly separate their own knowledge from that "learned" from the North testimony; or whether they could otherwise comply with the instruction. *See* JA 411, 2422.

After trial,[9] the defense again moved for a *Kastigar* hearing. But despite its repeated assurances that a final *Kastigar* hearing would be held at the conclusion of the trial, the court reversed its position, summarily denied the motion without argument, and refused to hold the hearing. The court declared that its pretrial opinion had "deal[t] with the full range of *Kastigar* problems," App. 318a, and it transformed the preliminary conclusions in that opinion into final rulings.[10]

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immunized testimony to prepare witnesses from those agencies for their testimony before Congress, at the grand jury, and for trial. *See* JA 3365-92. The defense sought to demonstrate in proffers that still other witnesses were exposed to immunized testimony and that they subsequently gave testimony or interviews to the IC and/or were to testify at trial. *See* JA 3240-54; *see also* Submission in Response to Court Suggestion (filed under seal June 28, 1988) (marked transcripts of Capitol Hill testimony of two government trial witnesses in which the witnesses explicitly responded to, and were questioned about, immunized testimony).

[9] The jury returned a verdict of not guilty on nine counts and guilty on three counts: aiding and abetting an endeavor to obstruct Congress (Count 6); destroying, altering, or removing official NSC documents (Count 9); and accepting an illegal gratuity, *i.e.*, a security system for North's home (Count 10).

[10] In denying the motion, the court ordered production of certain documents previously filed by the IC *ex parte*, including a file containing reports of IC exposure to immunized testimony, the

North was sentenced to a three-year suspended term of imprisonment, placed on probation for two years conditioned on the performance of 1200 hours of community service, and fined $150,000. North has completed his community service.

The Appeal

On appeal, the District of Columbia Circuit vacated the convictions on all three counts on Fifth Amendment grounds, reversed the conviction on Count 9 because of improper jury instructions, and remanded for further proceedings.[11]

The court of appeals held that the trial court's "truncated *Kastigar* inquiry" was "insufficient to protect North's Fifth Amendment right to avoid self-incrimination." App. 12a. "A central problem in this case is that many grand jury and trial witnesses were thoroughly soaked in North's immunized testimony," the court of appeals explained, "but no effort was made to determine what effect, if any, this extensive exposure had on their testimony." App. 26a. Instead, the trial court had limited its inquiry "to whether the *names* of witnesses were derived independently of the immunized testimony . . . [I]t made no determination of the extent to which the *substantive content* of the witnesses' testimony may have been shaped, altered, or affected by the immunized testimony." *Id.* (emphasis added).

The court of appeals rejected the trial court's conclusion that use of immunized testimony to refresh a witness's memory is "nonevidentiary" and permissible.

IC's showing of independent leads to the *identity* of trial witnesses (but not to the *content* of their testimony), and the brief *voir dire* of two replacement grand jurors seated after North's immunized testimony. North then filed another motion, arguing that those documents showed sufficient exposure to North's immunized testimony by prosecutors and grand jurors to compel dismissal or, at least, a hearing. That motion was denied. App. 320a.

[11] *See* App. 1a. Judge Silberman dissented from the court's rejection of certain of North's other arguments. Chief Judge Wald dissented from each of the rulings in North's favor.

It held that "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements" constitutes evidentiary use and is impermissible under *Kastigar*. App. 20a. However, the court of appeals added that "refreshment of witnesses' recollections is *indicative, but not exhaustive*, of the *Kastigar* questions left unanswered on the present record." App. 26a (emphasis added).

The court of appeals reviewed in depth the defense proffers indicating widespread use of North's immunized testimony by Executive Branch officials to prepare their congressional and grand jury testimony. *See* App. 26a-28a. It also focused on the "especially troubling" testimony of former National Security Advisor Robert McFarlane, a key witness against North at trial, who had "specifically requested" the opportunity to "respond to North's testimony" before Congress, who had "revised his earlier testimony in light of North's testimony," and who had "managed to recall items that he had not remembered in his prior testimony." App. 28a-29a. The court noted that despite this record evidence, "No effort was made to determine what use—if any—this government witness made of North's testimony in his trial testimony." App. 29a. McFarlane's testimony was "emblematic of both the weakness of the IC's position and the necessity of further *Kastigar* inquiry." App. 28a.

The court of appeals also rejected the IC's argument that *Kastigar* does not apply to grand jury proceedings. It distinguished situations in which a grand jury is presented with evidence that previously has been obtained illegally (what it referred to as the *"Costello-Calandra* rule"), explaining that "what is prohibited and unconstitutional under the Fifth Amendment and *Kastigar* is the *very presentation of the immunized testimony*." App. 37a (emphasis in original). Whereas "[t]he *Costello-Calandra* rule depends upon a distinction between the prohibited action and the presentation to the grand jury of the fruits of that prohibited action[,] *Kastigar* pro-

hibits use." App. 37a-38a. The court reviewed cases in the Second, Eighth, Ninth, Tenth, and Eleventh Circuits that had also interpreted *Kastigar* to preclude use of immunized testimony in the grand jury. App. 38a-40a.[12]

Finally, the court of appeals discussed the legal standards to be applied on remand. App. 43a-45a. The court ordered "a full *Kastigar* hearing that will inquire into the *content* as well as the *sources* of the grand jury and trial witnesses' testimony." App. 44a (emphasis in original). That inquiry must proceed witness-by-witness, the court stated, and "if necessary, it will proceed line-by-line and item-by-item." App. 44a-45a. For each witness, "the prosecution must show by a preponderance of the evidence that no use whatsoever was made of any of the immunized testimony either by the witness or by

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[12] The court also noted that two replacement grand jurors were qualified after North's immunized testimony, that there was no detailed inquiry as to their taint despite the "ubiquitous broadcast" of North's testimony, and that there was no evidence that warnings to grand jurors to avoid exposure to North's testimony were effective. Although these factors caused the court to "note with even greater concern" the trial court's failure to hold an adequate *Kastigar* hearing, the court did not require a hearing into "possible exposure of individual grand jurors through the media." App. 43a-44a.

The court declined to decide whether "nonevidentiary" use is permissible under *Kastigar* on the ground that there was no "significant nonevidentiary use" of North's testimony. App. 19a. Although no hearing had been held or record compiled with respect to the full extent of IC staff exposure to or use of immunized testimony, the court held that the trial court's "findings are thorough as to *precautions* taken by the IC to prevent untoward exposure or use by his staff." *Id.* (emphasis added). "Without significant exposure, the IC could not have made significant nonevidentiary use, permissible or impermissible." *Id.*

The court did not address North's arguments that trial jurors were seated even though a significant number admitted having seen, read, or listened to portions of North's immunized testimony; that the jury was not sequestered during trial despite contemporaneous media comparisons of the trial proceedings and North's immunized testimony; and that no hearing was held concerning juror exposure to North's immunized testimony during trial.

the [IC] in questioning the witness." App. 45a. If the IC fails to carry its burden as to any part of the immunized testimony, the court should consider "whether that failure is harmless beyond a reasonable doubt," and "memorialize its conclusions and rationales in writing." *Id.* If the failure is not harmless, North is entitled to a new trial or to dismissal of the indictment. *Id.*

The Rehearing Petition

The IC sought rehearing and rehearing *en banc*. In response, the panel majority addressed the dissenting judge's claim that the court's opinion had limited the IC's ability to show "non-use." The court reiterated that North "is entitled to a *hearing* at which he would be able to challenge the prosecution's case for non-use," but emphasized that it had not set forth any particular "techniques" that had to be used, and had not meant to foreclose the IC from trying to show non-use "in any fashion." App. 223a-24a (emphasis in original).

The court also rejected the suggestion that the IC had "produced something like 'a *prima facie* case' that the witnesses' testimony was not tainted," App. 225a. The court stated that it was "rather puzzled" by that suggestion, which was "construct[ed] . . . out of whole cloth," because "we do not perceive that the IC put on any evidence whatsoever directed to this issue." App. 225a-26a. The court further ruled that, even if North had some burden of coming forward with evidence, he had met it, since "at least one crucial witness changed his testimony before Congress after hearing the immunized testimony, and then presumably told the modified version to the trial jury. If by some alchemy the burden of going forward at the outset were to be shifted to the defendant (which we think plainly impermissible), *we find it impossible to understand why that undisputed showing alone would not satisfy that burden.*" App. 226a (emphasis added).[13]

[13] The panel majority also noted that even the dissent did not disagree on a "central point so vigorously disputed by the IC—

The full court denied the IC's suggestion for rehearing *en banc*. Chief Judge Wald alone dissented from the denial on the *Kastigar* issues.

REASONS FOR DENYING THE WRIT

The court of appeals' decision does not rest upon any novel or precedent-setting rulings of law. It broke no new legal ground, and it is entirely consistent with this Court's decision in *Kastigar* v. *United States* and with the overwhelming majority of cases applying that decision. Indeed, the IC himself had warned Congress that, under settled *Kastigar* principles, a grant of use immunity "would create serious—and perhaps insurmountable—barriers to the prosecution of the immunized witness." App. 229a; *see* App. 25a.

The decision is also of uniquely narrow application. As the IC himself recognized, "The unique nature of the Iran/Contra matter poses special problems. Few cases even remotely approach the exposure of immunized testimony created by nationally televised—and nationally scrutinized—Congressional hearings." *Immunity and Prosecution: A First Interim Report* at 14 (submitted by the IC to Congress on April 28, 1987). The decision principally addresses the use of immunized testimony through the testimony of witnesses who had been "thoroughly soaked" in the immunized testimony. App. 28a. Since immunized testimony almost invariably is given in the secrecy of the grand jury, it is the truly rare case that presents such an issue.

The decision is also interlocutory. The IC asks this Court to address hypothetical issues in a factual vacuum. Rather than do that, the court of appeals remanded for compilation of an appropriate record. The remand to the district court—and possible further review by the court of appeals—might moot the issues al-

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that the content and circumstances of testimony given by a witness exposed to the defendant's immunized testimony may constitute 'use' of the immunized testimony in violation of a defendant's constitutional rights regardless of the prosecutor's 'fault.'" App. 223a.

together. At a minimum, the hearing mandated by the court of appeals would greatly clarify both the extent of witnesses' exposure to and use of North's immunized testimony, and the practical operation of the court of appeals' ruling. Review at this stage, before the district court has compiled a record and before the IC has sought to make *any* showing of legitimate independent sources for the content of witnesses' testimony, would be premature.

I. THE PROSCRIPTIONS OF *KASTIGAR* APPLY IN THE GRAND JURY

In the past decade the courts of appeals have been virtually unanimous in holding that the proscriptions on use of immunized testimony apply to grand jury proceedings, and that a violation of an individual's privilege against self-incrimination by the grand jury is reviewable on appeal from a conviction. Indeed, the principle that *Kastigar* applies to grand jury proceedings is one of the few issues on which the three appellate judges agreed in this case. Far from being novel, the ruling below was in accord with the overwhelming weight of authority.

A. Use of Immunized Testimony by a Grand Jury Is Impermissible

1. All three members of the court of appeals panel considered and rejected the IC's argument that *Kastigar* does not apply at all to the grand jury. *Compare* App. 36a-42a (majority opinion) *with* App. 133a-134a (Wald, C.J., dissenting). The cases on which the IC relies for that argument are inapposite. Those cases hold that a defendant may not challenge the grand jury's consideration of evidence that was *previously* obtained illegally or in violation of the Constitution. *See, e.g., United States* v. *Calandra*, 414 U.S. 338 (1974) (witness may not refuse to answer grand jury questions based on illegally seized evidence); *United States* v. *Blue*, 384 U.S. 251, 255 n.3 (1966) (indictment not subject to dismissal if grand jury heard illegally obtained evidence, which included Tax Court petitions that defendant

argued contained disclosures that had been compelled in violation of Fifth Amendment); *Lawn* v. *United States*, 355 U.S. 339, 345-50 (1958) (evidence previously obtained from defendant who had not been warned of his privilege against self-incrimination could be considered by grand jury); *see also Costello* v. *United States*, 350 U.S. 359 (1956) (hearsay evidence could be considered in grand jury). The issue in those cases was the scope of the judicially created *remedy* for a past constitutional violation. As the panel majority explained on rehearing, use of such evidence does not "'work an additional wrong; [it is] only a derivative use of the product of a past unlawful [action].'" App. 233a (quoting *Calandra*) (internal quotations omitted). "'[W]hether such derivative use of illegally obtained evidence by a grand jury should be proscribed presents a question, not of rights, but of remedies.'" *Id.* (quoting *Calandra*).

Critically, in the cases on which the IC relies, the grand jury did not "'itself violate a valid privilege.'" *Id.* (quoting *Calandra*). By contrast, consideration of immunized testimony by the grand jury when it votes to return an indictment violates the constitutionally-mandated prohibition on use that underlies the use-immunity statute. "When the prosecution reneges on this constitutionally-mandated bargain and presents the immunized testimony to the grand jury, the constitutional violation is part and parcel of the grand jury process. The presentation—'use'—of the testimony is precisely the proscribed act. . . . [T]he situation is no different than if the grand jury had itself forced the defendant to give incriminating answers and any indictment based upon immunized evidence is no less tainted." App. 234a-235a. *Calandra* itself exempted this very situation from its reach, observing that a grand jury may consider incompetent evidence, "but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law." 414 U.S. at 346.[11]

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[11] The IC simply mischaracterizes *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989), in which this Court held that

This Court has made clear that the prohibition on use of immunized testimony is broader than the remedy for *past* constitutional violations. In *Harris* v. *New York*, 401 U.S. 222, 224-25 (1971), the Court held that statements obtained in violation of *Miranda* may be used to impeach a defendant's testimony at trial because "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* The Court weighed the incremental deterrence of police illegality against the policy against countenancing perjury and, on balance, use of the incriminating statements prevailed. In contrast, in *New Jersey* v. *Portash*, 440 U.S. 450 (1979), this Court held that use of immunized testimony is not subject to such balancing considerations and, consequently, that immunized testimony may not be used to impeach a defendant. *See id.* at 459. ("Testimony given in response to a grant

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a district court order denying a motion to dismiss an indictment because of an alleged violation of Fed. R. Crim. P. 6(e) is not immediately appealable under 28 U.S.C. § 1291. In reaching that result, this Court distinguished (1) the few constitutional provisions that guarantee that trial will not occur, such as the Double Jeopardy Clause, from (2) other constitutional protections whose violation does not give rise to a "right not to be tried" at all—even if a "failure to observe" those other protections "requires the trial court to dismiss the indictment or terminate the trial." 489 U.S. at 801-02. Only motions to dismiss based on the former type of violation, which may be characterized as a "right not to be tried," may be appealed pre-trial, according to *Midland*.

Midland did not, as the IC states, "dispose" of the issue presented here with a "statement of the law" that the grand jury's violation of the defendant's right against self-incrimination "is not to be remedied by dismissal of the indictment." Pet. 16. What the Court *did observe*, in its discussion of cases that do or do not qualify as "exception[s] to the final judgment rule," 489 U.S. at 801, was that "the grand jury's violation of the defendant's right against self-incrimination *does not trigger the Grand Jury Clause's right not to be tried*." *Id.* (emphasis added). The case simply did not address when dismissal of the indictment is proper, either by the trial court, or by the court of appeals *post-conviction*. Nor did it consider whether an indictment based on the grand jury's consideration of immunized testimony violates the Fifth Amendment's Self-Incrimination Clause.

of legislative immunity is the essence of coerced testimony . . . . Balancing, therefore, is not simply unnecessary. It is impermissible.").

2. The IC's representation that the courts of appeals are seriously split on the applicability of *Kastigar* to grand jury proceedings, and that two courts of appeals are in accord with the D.C. Circuit while two are not, is inaccurate. Pet. 11-13. In fact, in the past decade at least five courts of appeals, other than the D.C. Circuit, have held that *Kastigar* applies in the grand jury context.[15] In *United States* v. *Garrett*, 797 F.2d 656, 661 (8th Cir. 1986), the Eighth Circuit expressly rejected the analogy to *Calandra* and *Costello* advanced by the IC because those cases "simply [do] not consider the power of a court to look behind or dismiss an indictment where there is a strong likelihood that the grand jury process itself violated the witness's fifth amend-

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[15] *See United States* v. *Palumbo*, 897 F.2d 245 (7th Cir. 1990) (reversing conviction and dismissing indictment where government failed to demonstrate independent sources); *United States* v. *Garrett*, 797 F.2d 656, 662-65 (8th Cir. 1986) (vacating conviction and remanding for evidentiary hearing "to determine if Garrett's indictment rested on evidence which was in any way the product of his immunized testimony"); *United States* v. *Hampton*, 775 F.2d 1479, 1489 (11th Cir. 1985) (reversing conviction and holding that indictment must be dismissed unless government can demonstrate that "*none* of the evidence presented to the grand jury is derived, directly or indirectly, from the immunized testimony. . . .") (emphasis in original) (citation omitted); *United States* v. *Zielezinski*, 740 F.2d 727, 732-34 (9th Cir. 1984) (remanding for hearing at which government would be required to show independent sources for grand jury evidence); *United States* v. *Beery*, 678 F.2d 856 (10th Cir. 1982) (remanding for hearing, *inter alia*, on sources of evidence presented to grand jury). District courts in two other circuits have reached a similar conclusion. *See United States* v. *Turmon-Vega*, 656 F. Supp. 1525 (D.P.R. 1987) (dismissing indictment because evidence presented to grand jury was obtained directly or indirectly from immunized testimony), *aff'd sub nom. United States* v. *Boscio*, 843 F.2d 1384 (1st Cir.), *cert. denied*, 488 U.S. 848 (1988); *United States* v. *Cortese*, 568 F. Supp. 119 (M.D. Pa. 1983) (dismissing indictment because indicting grand jury had been exposed to defendant's immunized testimony).

ment privilege." *Garrett* referred to the Ninth Circuit's rejection of the same argument: "As the Ninth Circuit concluded in *Zielezinski*, *Costello* and its progeny only bar challenges to indictments in which an impropriety occurred in the evidence-gathering process; they do not bar 'challenges to indictments where improprieties occurred within the grand jury process itself.'" *Id.* (citing and quoting *United States* v. *Zielezinski*, 740 F.2d 727, 732 (9th Cir. 1984)).

Similarly, the Tenth Circuit observed that this Court "has recognized that there may be a different result where what was transpiring before the grand jury would itself violate a constitutional or statutory privilege. Where such a violation is occurring in the grand jury proceeding itself, the violation of the constitutional right or privilege is a proper basis for dismissal of an indictment." *United States* v. *Beery*, 678 F.2d 856, 860 (10th Cir. 1982) (citing *Calandra*, 414 U.S. at 346); *see also United States* v. *Cortese*, 568 F. Supp. 119, 132 (M.D. Pa. 1983) (rejecting reliance on *Lawn* and dismissing indictment where grand jury was exposed to defendant's immunized testimony).

3. The two appellate decisions on which the IC relies provide no basis for review.[14] More than a decade ago, and prior to the consistent line of authority cited above, the Fourth Circuit held that *Kastigar* does not apply in the grand jury context. That case, which was based on the alleged breach of a prosecutor's promise of immunity rather than an actual grant of statutory use immunity, did not address the distinction that the other courts of appeals have held to be persuasive, and it has not been reaffirmed by the Fourth Circuit. For at least 15 years the Second Circuit has consistently ruled in accord with the D.C. Circuit decision here—and in fact has gone

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[14] Pet. 12-14 (discussing *United States* v. *Society of Indep. Gasoline Marketers of America*, 624 F.2d 461 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981) and *United States* v. *Riviecio*, 919 F.2d 812 (2d Cir. 1990)).

well beyond it."[11] A recent panel decision holding *Kastigar* inapplicable to grand jury proceedings, on which the IC relies, does not acknowledge this long line of authority to the contrary, does not consider the reasoning of the other courts that have rejected application of the "*Costello-Calandra* rule" in this context, and, in any event, observes that the valid trial conviction in that case rendered any error harmless.[12] In light of the over-

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[11] *See United States* v. *Pelletier*, 898 F.2d 297 (2d Cir. 1990) (ordering trial court to consider whether government used immunized testimony to secure an indictment; if it did, dismissal is mandated unless error was harmless); *United States* v. *Nemes*, 555 F.2d 51, 55-56 (2d Cir. 1977) (government must carry burden of showing wholly independent sources for indictment or suffer dismissal); *United States* v. *Kurzer*, 534 F.2d 511, 515-17 (2d Cir. 1976) (same). The Second Circuit long has followed a *per se* rule *requiring* dismissal of an indictment where it is shown that the indicting grand jury has been directly exposed to immunized testimony. *See, e.g., United States* v. *Tantalo*, 680 F.2d 903 (2d Cir. 1982); *United States* v. *Anzalone*, 555 F.2d 317 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978); *United States* v. *Hinton*, 543 F.2d 1002, 1010 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976); *id.* at 1008 n.7 (rejecting suggestion that *Calandra* and *Lawn* foreclose a challenge to the grand jury's use of immunized testimony); *see also Goldberg* v. *United States*, 472 F.2d 513, 516 n.4 (2d Cir. 1973) (rejecting suggestion that *Lawn* and *Blue* prohibit dismissal of indictment obtained with immunized testimony).

In arguing that the Second Circuit is in conflict with the D.C. Circuit, the IC dismisses the holding in *Hinton* with the suggestion that it was based on the court's supervisory authority. Pet. 13 n.4. In fact, the *Hinton* panel held that the right it was enforcing was imposed by *Kastigar*. 543 F.2d at 1008. While the *remedy* chosen by the Hinton panel—to forego a hearing and hold as a matter of law that a showing of independent sources could never be made when the indicting grand jurors have themselves heard immunized testimony, *id.* at 1009-10—might reflect an exercise of its supervisory authority, the court made absolutely clear that the prosecution's burden to "establish that the legitimate evidence upon which the indictment was founded was gleaned from a source *'wholly* independent of the compelled testimony'" was "imposed by *Kastigar*." *Id.* at 1008 (citation omitted) (emphasis in original).

[12] A split of authority within a circuit generally provides no basis for review on certiorari. *See Davis* v. *United States*, 417 U.S. 333, 340 (1974); *see also* Harlan, *Manning the Dikes*, 13

whelming weight of authority consistent with the opinion below, the two cases cited by the IC do not justify review by this Court.

B. *United States* v. *Mechanik* Is Inapplicable

United States v. *Mechanik*, 475 U.S. 66 (1986), has no relevance here, since there is no factual predicate for its application.

1. Citing *Mechanik*, the IC asks this Court to consider whether "presentation [to a grand jury] of evidence derived from a defendant's coerced testimony . . . requires reversal of the conviction *after an untainted trial*." Pet. 17 (emphasis added); *see* petitioner's first Question Presented. That question is not presented, and a response from this Court would be purely advisory.

In *Mechanik*, this Court held that a violation of Fed. R. Crim. P. 6(d), which limits the individuals who may be present in the grand jury room, may not be corrected post-conviction by dismissal of the indictment. The Court observed that the purpose of Rule 6(d) is to protect against a charge for which there is no probable cause and held that "[m]easured by the petit jury's verdict" finding not only probable cause, but also guilt beyond a reasonable doubt, "any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." 475 U.S. at 70 (footnote omitted). *Mechanik* presupposed a "trial free from reversible error," *id.* at 71, without which there would be no basis for a conclusion that the conviction rendered any error harmless.

Here, the court of appeals vacated all three convictions [19] on the ground that the IC had not met its burden

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Record of NYC Bar Ass'n 541, 552 (1958) ("[D]ecisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself.").

[19] The court of appeals also reversed one count (Count 9) outright for improper jury instructions. App. 68a-76a, 235a-38a. The IC does not challenge that ruling here. *Mechanik* has no bear-

of proving them untainted by use of immunized testimony at trial. As a result, there is *no* valid conviction remaining to render error in the charging decision even arguably harmless. This case is not in the proper posture to determine whether, or how, *Mechanik* would apply where an otherwise valid conviction follows constitutional violations that occur in the grand jury.

Indeed, the IC's own petition makes clear that the *Mechanik* issue depends on speculation as to what will occur on remand: "And *if following remand the trial is found to have been untainted* . . . any error before the grand jury could have had no effect on the ultimate outcome of the prosecution." Pet. 11 (emphasis added); *see* Pet. 9 (ruling below may require dismissal "even if the trial was error-free"). Moreover, the IC has recognized that there was no need for the court of appeals even to have addressed *Mechanik*. In its appeal brief recently filed in *United States* v. *Poindexter*, No. 90-3125 (D.C. Cir.), the IC informed the D.C. Circuit that the panel in *North* "did not explicitly analyze the question whether dismissal of the indictment is the appropriate remedy when . . . it may be said with assurance that the defendant was convicted in an untainted trial . . . . *The North Court may have considered it unnecessary to address the question because of its finding that the trial itself may have been tainted.*" Brief of Appellee at 57 (filed January 18, 1991) (emphasis added).[20] It is "a venerable principle of this Court's adjudicatory processes not to . . . 'anticipate a question of constitutional law in advance of the necessity of deciding it,'"[21] but that is what the IC asks this Court to do.

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ing on the remand for a hearing ordered with respect to the indictment on Count 9.

[20] No doubt for this reason the IC did not raise *Mechanik* in its Petition for Rehearing to the panel below.

[21] *Webster* v. *Reproductive Health Services*, 109 S. Ct. 3040, 3060-61 (1989) (O'Connor, J., concurring) (citing *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 341, 346 (1936) (Brandeis, J., concurring)).

2. Neither the purported "express" conflict among the circuits on the specific application of *Mechanik* to this case, nor the claimed general rampant "uncertainty" among the lower courts on application of *Mechanik*, Pet. 19, provides any basis for review. Not one of the appellate cases claimed by the IC to be in "express conflict" with the decision below even addresses *Kastigar*. Moreover, no court of appeals to our knowledge has held that *Mechanik* precludes the post-conviction review of *all* assertions of grand jury error.[22] Certainly no case is cited extending *Mechanik* to cases where, as here, the conviction is not error-free but has instead been vacated.[23]

II. THE DECISION TO REMAND IS CORRECT, FACT-BOUND, AND INTERLOCUTORY

The remand for further *Kastigar* proceedings is based on well-settled legal principles, creates no conflict with any decision of this Court, and is entirely consistent with

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[22] At least five courts of appeal other than the D.C. Circuit have expressly refused to read *Mechanik* to preclude the post-conviction review of errors affecting substantial rights. The IC acknowledges that cases in the Third, Ninth, and Tenth Circuits are contrary to its position. Pet. 19; *see also United States* v. *Hooker*, 841 F.2d 1225, 1231 (4th Cir. 1988) (en banc) (error is not harmless when it affects "substantial rights"); *United States* v. *Wallach*, 870 F.2d 902, 905-06 (2d Cir. 1989). One court has read *Mechanik* to apply to "rules that are designed to prevent the indictment of innocent persons," such as the omission of exculpatory evidence or reliance on hearsay, while foreclosing any extension to rules that "serve[] functions other than the protection of the innocent." *See United States* v. *Fountain*, 840 F.2d 509, 515 (7th Cir. 1988).

[23] Additionally, the cases cited by the IC to demonstrate "uncertainty about the scope of *Mechanik*" (Pet. 19-20) present a jumble of unrelated fact patterns, united only in their citation to *Mechanik*. The decisions turn variously on their specific facts, on whether the cases arise in the context of a pretrial or post-conviction appeal, and on whether they were decided before or after *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989), which resolved a conflict as to the pretrial appealability of certain grand jury issues. Uncertainty about *Mechanik*'s application in those cases has little, if any, bearing on whether the court of appeals should have applied *Mechanik* here.

the procedures routinely followed in cases involving statutory use immunity. The court of appeals simply concluded that the IC must comply with the legal requirements explicitly set forth in *Kastigar* and satisfy its affirmative burden of demonstrating independent sources for its evidence when it seeks to prosecute a previously immunized defendant. The court of appeals held that, on the record before it, the IC had not made the required showing with respect to the *content* of witnesses' testimony. The possibility that the IC cannot meet that standard here because of the widespread dissemination of North's testimony—a possibility that the IC first recognized long before bringing this indictment, *see* App. 25a—does not make the appellate ruling novel or provide any basis for a relaxation of *Kastigar*'s basic requirements.

Moreover, the court of appeals based its decision on a careful analysis of the peculiar facts of this case, focusing on the widespread dissemination of North's testimony and the IC's total failure to show that the testimony was not used by grand jury and trial witnesses. As this Court has emphasized, it does "not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); *see also NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981).

Finally, the decision to remand is interlocutory, and review at this time would contravene this Court's policy against "premature constitutional adjudications." *Republic National Gas Co.* v. *Oklahoma*, 334 U.S. 62, 70-71 (1948). The remand, and any subsequent appeal, could well moot the constitutional issues ostensibly presented. At a minimum, the remand and any subsequent appeal would clarify the record and the scope of the court of appeals' holding. This lack of finality in the judgment below "of itself alone" furnishes "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

A. The Hearing Ordered on Remand Is Consistent with Case Law and Compelled by the Record

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Kastigar*, this Court ruled that the federal use immunity statute—which grants the government the extraordinary power to compel an individual to incriminate himself—is constitutional because a grant of use immunity leaves the witness " 'in substantially the same position as if the witness had claimed his privilege' in the absence of a grant of immunity." 406 U.S. at 458-59 (quoting *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 (1964)). The Court emphasized that the federal immunity statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." *Id.* at 453 (emphasis in original). The government is prohibited from using not only the compelled testimony itself, but also all "evidence derived directly and indirectly therefrom." *Id.*

Kastigar also outlined how courts should enforce this prohibition on use. An immunized witness "is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." *Id.* at 460. Instead, he "need only show that he testified under a grant of immunity *in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.*" *Id.* at 461-62 (emphasis added).

In response to the clear direction of *Kastigar*, lower courts routinely hold an evidentiary hearing to put the government to the test of carrying this "heavy burden." [24]

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[24] *E.g.*, *United States* v. *Palumbo*, 897 F.2d 245, 249-50 (7th Cir. 1990); *United States* v. *Rinaldi*, 808 F.2d 1579, 1584 (D.C. Cir. 1987); *United States* v. *Garrett*, 797 F.2d 656, 663-65 (8th Cir. 1986); *United States* v. *Zielezinski*, 740 F.2d 727, 733 (9th Cir. 1984); *United States* v. *Semkiw*, 712 F.2d 891, 894-95 (3d Cir.

At that hearing, the prosecution must either demonstrate an absence of exposure to the immunized testimony or must "systematically establish an independent source for each and every item of evidence." *United States* v. *Hampton*, 775 F.2d 1479, 1488 (11th Cir. 1985); *see also In re Sealed Case*, 791 F.2d 179, 182 (D.C. Cir.) (government must "meet the 'heavy burden' . . . of proving that all evidence it seeks to introduce is untainted by the immunized [testimony]") (citation omitted), *cert. denied*, 479 U.S. 924 (1986); *United States* v. *Beery*, 678 F.2d 856, 863 (10th Cir. 1982) (confronted with allegations that witness was exposed, government must show independent sources for evidence presented). The trial court "must make specific findings on the independent nature" of the evidence. *United States* v. *Rinaldi*, 808 F.2d 1579, 1584 (D.C. Cir. 1987). Because the prosecution bears the burden of proving that evidence "was free of taint and independently derived, [the court] may not infer findings favorable to it on these questions." *Id.* at 1583.[25]

The court of appeals' decision was based on the straightforward application of these principles to the record in this case. *See, e.g.*, App. 7a-9a, 12a. As that record discloses, the trial court conducted *no* inquiry into the extent of witnesses' exposure to or use of immunized testimony; it demanded *no* showing of independent sources for the content of witnesses' testimony; and it made *no* specific findings with respect to the source of *any* portion of the testimony of *any* witness. With the

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1983); *United States* v. *Beery*, 678 F.2d 856, 861 (10th Cir. 1982); *United States* v. *Nemes*, 555 F.2d 51, 55 (2d Cir. 1977).

[25] The courts have also provided guidance on what constitutes impermissible "use." For example, prior to the ruling below, the D.C. Circuit and three other circuits had ruled that the Fifth Amendment and *Kastigar* would be violated if it were shown that a witness was motivated to come forward with evidence against a defendant because of the defendant's immunized testimony. *Rinaldi*, 808 F.2d at 1584 n.7; *United States* v. *Brimberry*, 803 F.2d 908, 915-17 (7th Cir. 1986), *cert. denied*, 481 U.S. 1039 (1987); *Hampton*, 775 F.2d at 1489; *United States* v. *Kurzer*, 534 F.2d 511, 517-18 (2d Cir. 1976).

record falling far short of that necessary for the most basic *Kastigar* inquiry, *see, e.g.*, App. 12a, 26a, 32a, the court of appeals remanded for a full hearing—at which the IC can attempt to make a showing of non-use "in any fashion," App. 224a—and for development of a record. The court also ruled that the government on remand need only meet its burden of proof by a preponderance of the evidence, and it held that after an appropriate record is compiled, the trial court should determine whether the use of North's testimony was harmless beyond a reasonable doubt. App. 44a-45a.

B. The IC Asks This Court to Address Questions That Are Not Presented

The IC does not contest the fundamental legal principle on which the court of appeals based its decision—that *Kastigar* applies to the content of witnesses' testimony. Indeed, the IC admits that "witnesses may not present evidence about matters that they learn from the defendant's immunized testimony," Pet. 26, and it concedes that "when there is some concrete, articulable reason to believe that the testimony of particular witnesses has been tainted," a "careful review of the evidence will be necessary," Pet. 29. The IC also does not dispute that witnesses "immersed themselves" and were "thoroughly soaked" in North's immunized testimony. App. 21a, 26a. Nor does the IC assert that the trial court actually found that the *content* of witnesses' testimony was nonetheless untainted, or even that the IC sought to make any such showing. In short, the IC does not and could not challenge the core legal rules applied below. Instead, the IC advances hypothetical arguments premised on "facts" that have not yet been established.

1. In its second Question Presented, the IC seeks to have this Court review whether "the evidence of witnesses *who have a present, independent recollection of events must be excluded* from consideration by the grand and petit juries because those witnesses' memories may have been refreshed by exposure to immunized testi-

mony" (emphasis added). *See also* Pet. 23, 25. There is no evidence, and no finding by any court below, that the recollection of any witness was actually "independent" of North's testimony. The trial court permitted no examination of witnesses on the independence of their recollections, and that is one reason the court of appeals held that a remand is required. *See* App. 26a. The question posed by the IC seeks a ruling on a hypothetical issue, not on the record.

The IC also treats refreshment of recollection as though it were the only use at issue here, and then argues that refreshment is too attenuated a use to be of concern under *Kastigar*. Pet. 22-25.[26] In fact, however, the court of appeals expressly stated that the extent of refreshment was merely "indicative, but not exhaustive, of the *Kastigar* questions left unanswered on the present record." App. 26a.[27] The court of appeals remanded for a hearing, and development of a record, on the extent to which witnesses' testimony was tainted—directly or indirectly, by refreshment or otherwise. Absent such a record, it is also impossible to know whether the use is too attenuated to require exclusion of that testimony under *Kastigar*, as the IC asserts. *See* Pet. 23-25; App.

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[26] The IC attacks the court of appeals for prohibiting "any use whatever." Pet. 22, but it ignores *Kastigar*'s express prohibition on use "in *any* respect." 406 U.S. at 453 (emphasis in original). Far from being too protective, the court of appeals might not have gone far enough in enforcing this prohibition. The court of appeals did not require a hearing into the actual extent of prosecutorial exposure to North's testimony, and despite evidence that grand jurors had been exposed to that testimony, it declined to permit inquiry into grand jurors' exposure. *See* note 12, *supra*. It focused instead on what it apparently deemed the most significant and substantive use—by witnesses in their grand jury and trial testimony, App. 26a.

[27] The IC makes the following assertion, without citation: "Nor did the witnesses learn new information from North." Pet. 23. This finding is invented. As the court of appeals found, the trial court *never* inquired into "what effect, if any, [the] extensive exposure had on their testimony," App. 26a, and it never found that witnesses did not "learn" anything from North's testimony.

230a-31a.[28] The IC has simply assumed findings not yet made as the basis for its argument to this Court.

In any event, the court of appeals' decision to remand for an inquiry into the extent of refreshment, among other inquiries, was clearly correct. As the court ruled, use to refresh a witness's recollection may be "at the core of the criminal proceeding," App. 20a:

> When the government puts on witnesses who refresh, supplement, or modify [their testimony] with compelled testimony, the government uses that testimony to indict and convict. The fact that the government violates the Fifth Amendment in a circuitous or haphazard fashion is cold comfort to the citizen who has been forced to incriminate himself by threat of imprisonment for contempt.

Id. If a forgetful witness hears immunized testimony and then is called "to relate the events he had previously forgotten," it "would require a curiously strained use of language and learning to hold that in such a case no 'use' of the immunized testimony had been made against the defendant." App. 24a. Not surprisingly, the IC is unable to cite any case holding that a witness may be refreshed with immunized testimony.[29] It is hardly

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[28] If the IC contends that the use is *de minimis*, it can attempt to demonstrate that fact in the trial court. The court of appeals expressly invited the IC to try to make a showing of harmless error. App. 45a. The IC appears to fault the court of appeals for failing to rule that any use was harmless in the absence of a record on the nature and extent of the use.

[29] The IC argues that the court of appeals' ruling is "unprecedented" and lists cases in which immunized testimony was purportedly "widely disseminated," but refreshment was not a concern to the court. Pet. 25-26. None of those cases involved the pervasive dissemination of immunized testimony at issue here; none involved witnesses who "actually studied" the immunized testimony, App. 238a; and none condoned use of immunized testimony to refresh recollection. The facts of the cases make clear why they are inapposite. In *United States* v. *Serrano*, 870 F.2d 1, 13 (1st Cir. 1989), the only witness who was exposed and testified, a government agent, had no prior independent knowledge to be refreshed. Moreover, a separate indictment against Serrano had been dismissed

extraordinary that, before considering the extent to which refreshment might ever be permissible, the court below sought to find out how much refreshment actually took place.

The IC emphasizes that it did not use North's testimony to refresh witnesses' recollections, Pet. 22-23, and did not "exploit" the illegality, *id.* 25. This claim of "good faith" ignores *Kastigar*'s explicit rejection of the prosecutor's purported good faith as a substitute for an affirmative showing of non-use. 406 U.S. at 460.[20] The argument also ignores the fact that *all* exposure by witnesses resulted from the decisions of the government to immunize North and compel him to testify on national television. The IC—which appears before this Court in the name of the United States—must accept the consequences of those decisions.[21]

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because of exposure to the public immunized testimony to which the IC refers. *See Torruco-Vega*, 656 F. Supp. at 1537 (indictment dismissed as to defendant Serrano). In *United States* v. *Romano*, 583 F.2d 1 (1st Cir. 1978), the testimony was not "widely disseminated." It was given in closed session, *id.* at 5, and subsequent press conferences contained "no revelation . . . that might have influenced the Government's case." *Id.* at 9. No witness was identified who might have been exposed, and the defense never raised any issue of "exposed" witnesses. *United States* v. *Biaggi*, 909 F.2d 662, 689-90 (2d Cir. 1990), *cert. denied*, 59 U.S.L.W. 3598 (U.S. 1991), is irrelevant. The testimony was given in a state grand jury, and there was no claim that any witness was exposed to its content. In the three cases cited in which immunized testimony "became known" to witnesses, Pet. 26, the witnesses were not participants in the events at issue in the indictment, and refreshment was not an issue.

[20] Moreover, the IC made the deliberate decision to permit witnesses who had had their recollections refreshed with immunized testimony to testify in the grand jury and at trial. *See* JA 775.

[21] *See Murphy*, 378 U.S. at 77-78 (federal government is bound by immunity granted by states). Even if *the IC* did not use North's testimony to refresh recollections, the exposure of witnesses did not simply occur "in the natural course of events," as the IC asserts. Pet. 23. The court of appeals reviewed defense proffers showing that government officials and attorneys from the Departments of

2. In its third Question Presented, the IC asks whether the trial judge "*must conduct an item-by-item examination* of the grand jury and trial evidence to ensure that it was not affected by the immunized testimony, even when the prosecutors were not exposed to the immunized testimony, the witnesses were identified without reference to the immunized testimony, and the grand jury and trial witnesses were directed to testify only from their personal knowledge of events." (Emphasis added). Again, the issue raised in this question is not actually presented.

First, the court of appeals did not demand an "item-by-item" examination of all evidence. *See also* Pet. 28. Rather, the court stated that the trial court should proceed on remand "witness-by-witness" and, *if necessary*, "line-by-line and item-by-item." App. 44a-45a.[32]

Second, the court of appeals did not "construct[] a procedural edifice," Pet. 26, adopt "particular" and "rigid procedural rules," *id.*, or render a "blanket holding [that] imposes unnecessary burdens on an entire category of prosecutions," Pet. 29, as the IC charges. In its opinion on rehearing, the panel stated that the IC is not limited to any particular "techniques" on remand and may try to make the constitutionally mandated showing "*in any fashion*." App. 223a-24a (emphasis added). This ruling followed the explicit direction of *Kastigar*, which requires that independent sources be shown for *all* of the government's evidence. 406 U.S. at 461-62; *see also, e.g., Hampton*, 775 F.2d at 1488 (requiring inde-

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State and Justice, the Central Intelligence Agency, and the National Security Council, "gathered, studied, and summarized North's immunized testimony in order to prepare themselves or their superiors and colleagues for their testimony before the investigating committees and the grand jury." App. 26a-28a.

[32] Given that witnesses "actually studied" (App. 231a) and were "thoroughly soaked" in immunized testimony, App. 26a, and that the IC could not identify a single witness who was not exposed, JA 763-64, it may well be that a detailed inquiry into the evidence will be necessary for each witness. But that is a consequence of *Kastigar* and the particular facts of this case, not a "blanket rule" or rigid "procedural edifice" imposed by the court of appeals.

pendent source for "each and every item of evidence"); *Rinaldi*, 808 F.2d at 1584 (requiring "specific findings on the independent nature of [the] proposed evidence").

Third, the third Question Presented essentially asks this Court to rule as a matter of law that the confluence of certain alleged facts—that prosecutors were not exposed to immunized testimony, that witnesses were identified without reference to immunized testimony, and that grand jury and trial witnesses were directed to testify only from personal knowledge—somehow amounted to a *prima facie* case that satisfied its burden of proof under *Kastigar*. *See also* Pet. 27-28. However, the court of appeals rejected any argument that the IC had presented a *prima facie* case that witnesses' testimony was not tainted; indeed, it stated that the IC had not "put on any evidence whatsoever directed to this issue." App. 225a. The IC ignores this finding.[33]

The IC's third Question Presented also ignores a second critical finding. Even the IC concedes that a "careful review of the evidence" is necessary *when there is "reason to believe" that witness testimony is tainted*. Pet. 29. Here, the court of appeals held that there is reason to believe that the testimony of particular wit-

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[33] The IC further argues that a remand is unnecessary "when the defense can provide no evidence whatsoever that the witness was influenced by the exposure." Pet. 30. This contention is directly at odds with the express holding of *Kastigar*, under which the defense need only demonstrate that the defendant testified under a grant of immunity "in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." 406 U.S. at 461-62. The court of appeals also held that the defense *had* satisfied any burden that it had of coming forward. App. 226a. Moreover, the defense repeatedly sought to examine witnesses about their exposure and use. *See* pages 3-4, *supra*. The IC opposed these efforts, and the trial court refused to allow any questioning of witnesses on *Kastigar* issues. Under these circumstances, the IC's effort to shift the burden to the defense, which was foreclosed from making a record, is particularly unpersuasive. Any argument that such a burden falls on the defense *after* the IC has made a *prima facie* showing is premature, since no such showing has been made.

nesses was tainted, App. 26a-28a, 226a, and that a remand is necessary for the development of a complete factual record on that issue.[34] The need for a remand therefore cannot seriously be questioned.[35] The facts listed in the Question Presented are incomplete,[36] and the IC

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[34] The IC suggests that the "tenor" of the decision below is "difficult to square" with three cases that made "the common sense determinations . . . that *Kastigar* hearings are not necessary in all cases." Pet. 29. This assertion is baffling. In each case cited by the IC a finding of independent sources for the evidence presented by the government was made, following a factual showing. In any event, this Court resolves conflicts among holdings, not "tenors," of decisions.

[35] The IC's assertion in this Question Presented that prosecutors were not exposed to immunized tsetimony, repeated elsewhere, *see* Pet. 13 n.4, 22, 27, is also inaccurate. The trial court inquired only into precautions taken to avoid exposure (and not their effectiveness), and the court of appeals concluded only that the exposure was not "significant." App. 19a. Indeed, the court of appeals directed that the hearing on remand include an inquiry into use made of immunized testimony "by the [IC staff] in questioning" witnesses. App. 45a.

[36] The court of appeals properly rejected mere warnings to witnesses as insufficient to ensure, at least in the context of this case, that North's testimony was not used by witnesses in their testimony. App. 36a. The IC cites no case holding that warnings to witnesses are an adequate substitute for the affirmative government showing of no use required by *Kastigar*. The trial court made no findings as to the adequacy of warnings in preventing witnesses from using the immunized testimony in their own testimony. *See* App. 26a, 33a, 226a & n.4.

Contrary to the statements of the IC, our system is not "premised on the presumption that all participants in a trial will follow the judge's instructions," and that witnesses will testify only to their personal knowledge. Pet. 29a. Witnesses take oaths to tell the truth, but are not presumed to do so; that is the function of cross-examination and other procedural devices. Unlike jurors, who are generally presumed to follow instructions of the court, *but see Bruton v. United States*, 391 U.S. 123, 129 n.4 (1968) (instructions are not "inevitably sufficient" to protect a defendant's constitutional rights), witnesses are not disinterested. Many witnesses were hostile to North, testifying under grants of immunity, or facing sentencing. As a consequence, they would have had their own reasons for not fully heeding the warnings, even assuming they

invites the Court to reason "from hypothetical situations on matters not presented by the facts of this case." *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 827 n.4 (1986). That invitation should be declined.

C. The Question Whether Improper Use Was Made of Immunized Testimony Is Fact-Specific and Does Not Warrant Review by This Court

Review by this Court is unwarranted because the decision below—that on the facts before the court of appeals, the IC had not met its burden of showing that no use was made of North's immunized testimony—is fact-specific. The court found that there was no showing that the content of witnesses' testimony was untainted. It remanded to provide the IC with an opportunity to make that showing. The remand is not based on "new rules," Pet. 21, but on the application of established rules to the facts of this case. It is well settled that this Court does "not grant a certiorari to review evidence and discuss specific facts." *See Johnston*, 268 U.S. at 227. Review of the remand decision here would involve just such a review of the evidence.

D. The Decision to Remand Is Interlocutory

Finally, this case "is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R. Co.*, 389 U.S. 327, 328 (1967). As the Court has previously stated, "except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258.

The remand decision is plainly interlocutory. The record to be compiled on remand would indicate the ex-

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could segregate their exposure to and use of immunized testimony. Absent cross-examination on their ability and willingness to follow the warnings, which the defense sought but was denied, *see* JA 411, 2422, the warnings themselves prove nothing. And since the warnings given below sought only to preclude testimony based on information "learned" from North's testimony, and by their terms permitted testimony refreshed or motivated by the immunized testimony, their inadequacy to prevent "any use" is apparent.

tent of exposure to and use of North's testimony by grand jury and trial witnesses. It should either moot the issues advanced by the IC in its current petition, or provide the factual predicates that are now missing for the presentation of those issues. Resolution of the large number of threshold questions that are unanswered on the present record—including, among other questions, whether witnesses who testified had independent recollections of events, whether they were able to heed the court's warnings, whether they learned information from North's testimony, and whether they were motivated by North's testimony to testify against him as they did—would clarify the legal issues actually raised by this proceeding.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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